IN THE

Supreme Court of the United States

October Term, 1944

No. 952

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President Thereof, et al., *Petitioners*,

vs.

SHELTON PITNEY and WALTER P. GARDNER, Trustees of Central Railroad Co. of New Jersey, BROTHERHOOD OF RAILROAD TRAINMEN, W. L. REED, Vice President Thereof, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION AND BRIEF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above-entitled cause on September 25, 1944.

OPINION BELOW.

The opinion of the Circuit Court, reported in 145 F. (2d) 351, appears in the printed record, at pages 81 to 85.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925 (28 U. S. C. 347).

STATUTES INVOLVED.

The Railway Labor Act, as amended (45 U. S. C., Sec. 151, *et seq.*), and Section 77 of the Bankruptcy Act (11 U. S. C., Sec. 205), the pertinent provisions of which are set forth in the appendix to this petition.

STATEMENT OF THE MATTER.

The Central Railroad Company of New Jersey (hereinafter referred to as the "carrier") is in the process of reorganiaztion under Section 77 of the Bankruptcy Act, as amended, 11 U. S. C., Section 205. The reorganization proceeding is pending in the United States District Court for New Jersey, and the carrier is in the possession and under the operation and control of Shelton Pitney and Walter P. Gardner, trustees of that court and defendants in this case.[1] (R. 1)

On March 6, 1943, the Order of Railway Conductors of America (hereinafter called the ORC), a railway labor union, petitioners here, filed a petition with the District Court which alleged that for many years it had been the duly accredited bargaining representative, under the Railway Labor Act, as amended, of the road conductors of the

[1] The records of the United States District Court of New Jersey show that the Central Railroad Company of New Jersey has been in reorganization since November 28, 1939, and at all times under the operation and control of Shelton Pitney and Walter P. Gardner as trustees of the court.

carrier; and that for approximately 35 years road conductors had manned five daily freight trains, known as the Standard Oil and Bayway drills, under rules, rates of pay, and working conditions which it had negotiated with the carrier (R. 2), as evidenced by petitioners' bargaining agreement with the carrier dated Aug. 1, 1927 (See Trustees' Ex. 1)

The petition alleged that on March 7, 1940, the ORC and carrier by written agreement provided that the method of assigning conductors to service theretofore on these five drills would not be changed except by agreement of the parties. (R. 2, 3, 8, 9). It further alleged that the said agreement affected no change in working conditions for the operation of such drills "but merely continued working conditions as they had existed for more than 35 years." (R. 3)

On March 7, 1943, the petition alleged that the trustees of the carrier posted a notice indicating an intention to displace the road conductors on the five drills referred to with yard conductors. (R. 4, 5, 6, 12, 13, 14, 15, 16) And, finally, the petition charged that the trustees had given no thirty-day notice of their intention to change the agreement of the carrier, as required by Section 6 of the Railway Labor Act which provides as follows:

> "Section 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5

of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Then Section 2, Seventh, provides:

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Subdivision (n) of Section 77 of the Bankruptcy Act (11 U. S. C., Sec. 205 (n)) specifically provides that trustees of railroads in bankruptcy shall comply with the provisions of the Railway Labor Act when changing working conditions by the following:

"* * * No judge or trustee acting under this Title shall change the wages or working conditions of railroad employees except in the manner prescribed in Sections 151 to 163 of Title 45, as amended, * * *."

The petition prayed for a summary order to restrain the trustees from violating the contract of March 7, 1940, and for a final order permanently enjoining the trustees from violating such contract "so long as such contract shall not be altered or amended in accordance with the provisions of the Railway Labor Act or other applicable provisions of the law * * *." (R. 6, 7)

The trustees, in answering the petition, acknowledged the making of the contract of March 7, 1940, but contended that it was not binding upon the Brotherhood of Railroad Trainmen (hereinafter called the BRT), who represented the yard conductors, because the BRT was not a party to such contract. The trustees, however, did not deny that they were bound by the contract. The trustees also showed that they had executed a later agreement on behalf of the carrier with the BRT, to which the ORC was not a party, under which the five Standard Oil and Bayway drills would be manned by yard conductors—which agreement was to

be effective March 16, 1943. (R. 34, 35, 36) They stated that they had advised H. W. Fraser, President of ORC, that if in his opinion the displacement was in violation of the ORC agreement, it could be handled in accordance with the adjustment procedure set forth in Section 3(i) of the Railway Labor Act. The trustees also questioned the jurisdiction of the court to grant the relief requested and suggested that the petition should be dismissed without prejudice to the petitioners to file claims with the National Railway Adjustment Board. (R. 26, 27)

It should be stated parenthetically that before the ORC filed its petition in the District Court, it sought to invoke the services of the National Mediation Board in an effort to forestall a change in its agreement in violation of the provisions of Section 6 of the Railway Labor Act. In response to its request, the Board, in a letter to ORC dated January 21, 1943, quoted a letter from the carrier as stating:

> *"It is the position of the Carrier that it has filed no notice of a desire to change existing agreements, nor does it propose to do so, and that this matter is a claim which under* . . . . the Railway Labor Act is referable to the National Railroad Adjustment Board, if and when the Carrier proceeds with and carries out its intention of taking off road conductors on these five crews operating wholly within switching limits and substituting yard conductors as required by the Trainmen's Agreement. In other words, when that is done the Conductors, if they feel that any rule or agreement with them has been violated, can proceed exactly as the General Chairman stated in the next to the last paragraph of his letter of November 25th to file a claim with the Adjustment Board for pay for every day the road conductors are denied the right to work on these five crews and yardmen are permitted to man them. It becomes then, a question for the Adjustment Board to interpret and apply whatever agreements can be produced to determine whether the Carrier has violated the agreements or not and make the proper award."

The Board concluded its letter by referring to the quotation from the carrier's letter, as follows:

> "From the above it does not appear that the carrier has yet proceeded to carry out its intention and that when it does, your remedy is to make claim under your existing agreement."

(See Petitioner's Exhibit 12 at p. 32 of Appendix hereto.)

The BRT intervened and filed an answer in which it alleged, among other matters, that it had entered into an agreement with the trustees on March 6, 1943, (effective March 16, 1943) under which the yardmen were to man the five drills in question. The answer further contended that the District Court was without jurisdiction to determine the controversy presented by the petition. (R. 37-45, incl.)

The matter was referred to a Master. (R. 43, 45) The Master took evidence and submitted an intermediate and final report. It was the opinion of the Master that both the agreements of March 7, 1940, and March 6, 1943, involved conditions that could be made.

> "* * * the subject of agreement between the carrier and the respective employees concerned in them. * * * But neither 'changed working conditions', within the meaning of the provisions of U. S. C. A., Title 11, Section 205 (n), and the Railway Labor Act, U. S. C. A., Title 45. That being so, it is the opinion of the Master that this court has jurisdiction to entertain this petition and make a decision upon the merits." (R. 52)

From the above and other portions of the Master's reports, it is clear that the Master concluded that the District Court did not have jurisdiction if the proposed displacement of road conductors by yard conductors would constitute a change in "working conditions" within the meaning of the sections of the Bankruptcy Act and Railway Labor Act which he referred to.

The Master also recommended that the five drills in dispute be manned by yard conductors. (R. 59-66 incl.)

The District Court decided that it had jurisdiction over the subject matter, confirmed the Master's reports and entered an order directing the trustees to carry out the terms of the contract of March 16, 1943, with the BRT. With respect to Section 6 of the Railway Labor Act, the District Court held:

> "The said agreement effective March 16, 1943, is in no wise in violation of U. S. C. A., Title 11, Section 205 (n) or Sections 151 to 163 of the Railway Labor Act, as amended, U. S. C. A., Title 45." (R. 78)

This holding, as the recommendation of the Master, was based upon the assumption that the proposed displacement of road conductors by yard conductors would not constitute a change in "working conditions" requiring thirty-day notice under the Railway Labor Act.

From this judgment, the plaintiffs appealed.

In the Circuit Court, plaintiffs argued that the District Court had erred in holding that the agreement between the trustees and the intervenor, dated March 16, 1943, did not change "working conditions" within the meaning of Section 6 of the Railway Labor Act. It requested that court to adjudge the contract of March 16, 1943, between the trustees and BRT to be invalid insofar as it affected the class or craft of road conductors represented by the plaintiff on the five Standard Oil and Bayway drills, and asked that the road conductors on such drills be returned to the jobs from which they had then been displaced.

The Circuit Court found that the District Court had *no jurisdiction to grant the relief requested and issued an order vacating the judgment of the District Court and remanding the proceeding to that court for dismissal (of petition) without prejudice* to any action or proceeding not in conflict with the Railway Labor Act." The reasons underlying the action of the Circuit Court are best expressed by the following from its opinion:

"In this case, each Brotherhood has in force a basic agreement with the carrier relating to rates of pay, rules, and working conditions; and each craft of conductors involved in the controversy maintains its own seniority roster. The thirty-day notice required by section 6 of the Railway Labor Act of an intended change in rates of pay, rules, or working conditions was not given, and no effort was made to proceed in the manner prescribed by the Act. If the conductors should be displaced on the five drills in question, in contravention of the basic agreement, the volume of work available for members of that craft would be curtailed by that amount, and in the event of a sufficient diminution in business of the carrier those lowest on the roster would that much sooner be assigned to other runs, or be temporarily demoted to service as brakemen, or be without employment. And at the same time yard conductors would gain advantage in inverse order. *Therefore the proposed displacement of road conductors with yard conductors did involve a change in working conditions, within the sweep of the Railway Labor Act. And the remedy prescribed by the Act was exclusive. Switchmen's Union v. National Mediation Board, supra; General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co., supra; General Committee of Adjustment v. Southern Pacific Co., supra.* (Emphasis added.)

"Reliance is placed upon Section 24 (8) of the Judicial Code, 28 U. S. C. A. § 41-(8) to sustain jurisdiction. The section vests in the district courts jurisdiction of all suits and proceedings arising under any law regulating commerce. That is a broad grant of general jurisdiction, and it does not have application in a case of this kind where Congress has made specific provision for the protection of the right which it created. Switchmen's Union v. National Mediation Board, supra. We think the petition failed to submit any right which was presently appropriate for protection or enforcement by judicial decree." (R. 83, 84)

Notwithstanding that the Circuit Court held that "the petition failed to submit any right which was presently appropriate for protection or enforcement by judicial decree,"

it proceeded thereafter by way of obiter dictum to add the following:

> "But if we should be mistaken in respect of the lack of jurisdiction, the yard[2] [road] conductors are not entitled to prevail on *the merits.* * * *" (emphasis added) (R. 84)

This statement and the subsequent remarks of the court reveal that it regarded "the merits" of the case as raising the question of whether the agreement of the ORC should be enforced as a matter of equity, when considered apart from the provisions of the Railway Labor Act, *and not whether the ORC had a right to require the trustee to comply with Section 2, Seventh, and Section 6* when changing an agreement affecting working conditions.

On October 19, 1944, the plaintiffs filed a petition and brief for rehearing. They argued that, the Circuit Court having held that "the proposed displacement of road conductors with yard conductors did involve a change in working conditions within the sweep of the Railway Labor Act," the court was thereafter under a statutory duty to direct the District Court to order the trustees to comply with the thirty-day notice provision and other requirements of Section 6 of that Act and subsection (n) of Section 205 of Title 11, U. S. C. (App. 30, 32)

The petition for rehearing was denied November 16, 1944, without opinion. (R. 108)

THE POSITION OF THE PETITIONERS.

Subdivision (n) of Section 77 of the Bankruptcy Act contains an unequivocal requirement that no judge or trustee acting under that Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended. Section 2, Seventh, and Section 6 of the Railway Labor Act

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[2] See correction of opinion where the word "yard" was changed to read "road." (R. 107)

prescribe the procedure that shall be followed by carriers and representatives of employees intending to change agreements affecting working conditions. Section 1 of that Act defines the term "carrier" to include "trustee" and "judicial" body when in possession of the business of any such carrier. The Circuit Court held that "the proposed displacement of road conductors did involve a change of working conditions within the sweep of the Railway Labor Act." Having made this determination, we submit the court had no alternative but to compel the trustees to comply with the provisions of the Railway Labor Act which prescribe the procedure for effecting changes in agreements. By virtue of the bankruptcy proceeding, the District Court had exclusive jurisdiction over the debtor carrier and its property, and the trustees thereof were agents of that court. It was just as much the duty of the court to require the trustees to obey the Railway Labor Act which had been made specifically applicable to employees of railroads in bankruptcy as it was to require obedience to the many other laws which fix the duties and functions of trustees. Moreover, as parties to the contract which the trustees intended to change, the petitioners had the legal right and the standing to insist that the trustees be restrained from violating the law to their detriment. They had no other forum to which they could go to enforce such right.

The Circuit Court wrongly assumed that is was powerless to prevent its own trustees from violating subdivision (n) of Section 77 of the Bankruptcy Act and Section 6 of the Railway Labor Act because it assumed the latter Act provided an exclusive remedy for the enforcement of such section.[3] The Circuit Court cited *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U.

[3] The Court did not state what remedy the Act provided for the enforcement of Section 6.

S. 338, as requiring it to reach this conclusion. Obviously, these decisions have no application to the issue presented in this case as they are not even remotely related to the question of whether a district court is authorized or required to compel its own trustees to comply with the mandatory provisions of the Railway Labor Act. There is no reason to search the background and legislative history of the Railway Labor Act to determine whether Congress provided an administrative remedy or an exclusive remedy for the enforcement of Section 6 to decide whether the district court in a reorganization proceeding has the power or duty to enforce such section. The text of subdivision (n) of Section 77 of the Bankruptcy Act and Sections 1, 2, Seventh, and 6 of the Railway Labor Act have made that unnecessary. There the Congress made it clear that a court and its trustees in possession of a carrier under a bankruptcy proceeding are under a duty to comply with the Railway Labor Act when changing an agreement affecting working conditions.

The decision of the Third Circuit Court is also in direct conflict with the decision of the Second Circuit Court in *Burke* v. *Morphy*, 109 F. (2d) 572 (cert. den. 310 U. S. 635), which held that a railroad receiver had no authority to change working conditions without complying with Section 6.

The statement of the Circuit Court on what it termed "the merits" of the case, we submit, must stand as mere dictum in view of the court's decision on the jurisdictional question and its final order in the case. Should this court disagree with this contention, we ask that the whole of the opinion of the court below be reviewed to the extent necessary to determine the "Question Presented" and afford the petitioners the relief essential to the enforcement of Section 6 of the Railway Labor Act against the defendant trustees.

QUESTION PRESENTED.

The Circuit Court having held that the proposed displacement of road conductors by yard conductors would involve a change in working conditions within the sweep of the Railway Labor Act, does the District Court have jurisdiction and is it under a duty to restrain its trustees in bankruptcy from making such change in violation of Section 2, Seventh, and Section 6 of the Railway Labor Act and subdivision (n) of Section 77 of the Bankruptcy Act?

REASONS FOR GRANTING THE WRIT.

(1) The Circuit Court improperly applied the decisions of this court in *Switchmen's Union* v. *Board, supra; General Committee* v. *M.-K.-T. R. Co., supra; General Committee* v. *Sou. Pac. Co., supra.*

(2) The decision of the Circuit Court is in conflict with the decision of the Second Circuit in *Burke* v. *Morphy,* 109 F. (2d) 572 (cert. den. 310 U. S. 635).

Wherefore, the petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President Thereof, et al., *Petitioners*,

v.

SHELTON PITNEY AND WALTER P. GARDNER, Trustees of Central Railroad Co. of New Jersey, BROTHERHOOD OF RAILROAD TRAINMEN, W. L. REED, Vice President Thereof et al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PRELIMINARY STATEMENT.

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statutes involved and a summary statement of the facts of the case.

ARGUMENT.

This case presents only one issue: The Circuit Court having found that the proposed displacement of road conductors by yard conductors did involve a change in working conditions within the provisions of the Railway Labor Act, does the District Court have jurisdiction and is it under a duty to restrain its trustees in bankruptcy from making

such change in violation of Section 2, Seventh, and Section 6 of the Railway Labor Act and subdivision (n) of Section 77 of the Bankruptcy Act?

The Master, the District Court and the Circuit Court, committed a common error. Each falsely assumed that if the proposed displacement of road conductors by yard conductors constituted a change in an agreement affecting "working conditions" within Section 2, Seventh, and Section 6, that the court had no jurisdiction to entertain the petition of the ORC which sought to compel the trustees to comply with these provisions—because it further assumed that the Act provided an exclusive remedy for the enforcement of these sections. The Master and the District Court held that the proposed displacement did not involve a change in working conditions within the Act and concluded therefrom that the District Court had jurisdiction. The Circuit Court, on the other hand, after examining the facts and considering the law, held that the proposed displacement did constitute such change and concluded the courts had no jurisdiction—even to require compliance from its own trustees.

It is the position of the petitioners that the jurisdiction of the District Court to require the trustees to comply with these provisions of the Railway Labor Act depended precisely upon whether the proposed displacement of road conductors by yard conductors did constitute a change in an agreement affecting "working conditions." Once the court had determined that question in the affirmative, it was under a statutory duty to grant the requested relief.

THE BASIS FOR THE JURISDICTION OF THE DISTRICT COURT.

A. Section 77 of the Bankruptcy Act (11 U. S. C., Sec. 205).

Subdivision (a) in part provides:

> "* * * Upon the filing of such a petition [petition for reorganization], the judge shall enter an order either approving it as properly filed under this sec-

tion, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

In subdivision (c) a judge in a bankruptcy reorganization proceeding is authorized to appoint one or more trustees of the debtor's property, and it is provided that

"* * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, *subject to the control of the judge and consistently with the provisions of this section*, all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title, and, *to the extent not inconsistent with this section*, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by Chapter I of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor." (Emphasis supplied.)

And subdivision (n) in part provides:

"No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in Sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended."

From the provisions quoted, it is clear that a trustee in bankruptcy is an agent of the appointing judge and fully subject to his supervision and control in all matters affecting the management and operation of the debtor carrier.

Subdivision (n) is specific in its terms as requiring both the judge and the trustees to comply with the provisions of the Railway Labor Act with respect to the making of changes in wages or working conditions of railroad employees. They are just as much obliged to obey Section 6 of that Act as the many other laws which fix the duties and functions of judges and trustees in bankruptcy proceedings. They have no liberty of contract which can operate in diminution of these provisions. The District Court in which the reorganization proceeding was brought had exclusive jurisdiction over the debtor carrier and its property, and its agent trustees. There was no other forum to which the petitioners could go for the relief sought. As parties to the contract which the trustees were intending to change, the plaintiffs had the legal right and the standing to insist that the trustees be enjoined from violating the law. We submit, therefore, that the court had jurisdiction over both the defendant trustees and the subject matter of the petition. These conclusions are fully supported by the decision of the Fifth Circuit Court of Appeals in *Peavy-Wilson Lumber Co.*, v. *Loftin*, 131 F. (2d) 579. In that case the District Court was reversed for dismissing for lack of jurisdiction a petition of intervention in a railroad reorganization proceeding where the plaintiff company invoked the ancillary jurisdiction of the court to have it determine its rights under a contract with the railroad trustees by which the plaintiff company claimed the trustees had agreed that they would not exercise their option under a contract to put their own crews on the plaintiff's engines and cars unless required to do so by lawful order of some governing body, state or federal. In passing upon the question of jurisdiction, the court at page 582 said:

> "We agree with appellant. Whatever may be said as to the right of the brotherhoods to be dismissed from the action, it is quite clear that plaintiff's intervention presented matters between it and the trustees

properly for the decision of the court. Indeed, in view of the relief sought, control of the operations of railway properties in reorganization proceedings, the jurisdiction of no other court could properly have been invoked. It was reversible error then for the court to dismiss the intervention though without prejudice and with leave to proceed elsewhere."

B. The Provisions of the Railway Labor Act.

Petitioners submit that not only does Section 77 of the Bankruptcy Act confer jurisdiction upon the District Court to grant the relief requested in plaintiffs' petition but that the provisions of the Railway Labor Act confer such jurisdiction as well.

Section 2, Seventh, provides that:

> "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The term "carrier" is defined in Section 1 to include

> " * * * any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier.' "

By substituting the word "trustee or "judicial" body for the word "carrier" in Section 2, Seventh, we have a definite and precise prohibition running against the court and its trustees in this case—enjoining them from changing "working conditions," as embodied in agreements, except as prescribed in Section 6. Statutory language could scarcely be more clear and unambiguous. It fixed the power and duty of the court and its trustees when seeking to change the working conditions of employees of a carrier in their possession and control.

That a receiver and receivership court may not operate in disregard of the Railway Labor At was definitely

established by a decision of the Second Circuit Court of Appeals in *Burke* v. *Morphy*, 109 F (2d) 572. There the Rutland railroad was in receivership under a creditor's bill. The District Court issued an order directing the receiver to retain fifteen percent of the wages of the employees, such retained wages to constitute only general claims against the receivership. The Second Circuit Court held the order invalid because the District Court and receiver did not comply with the provisions of the Railway Labor Act with respect to changing agreements affecting wages and working conditions. It said:

> "'On the merits, we cannot find any legal justification for the order. The order did affect wages and was in substance a wage cut; no wage cut may be imposed unless the provisions of the Railway Labor Act, 45 U. S. C. A., section 151, et seq., are first obeyed; and no attempt was made to comply with this Act. The Railway Labor Act (48 Stat. 1185, 45 U. S. C. A., sec. 151) applies to every interstate carrier, including a carrier that is being operated by a receiver. The Act forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement. Either party may call in the National Mediation Board, or the Board itself may proffer its services. Rates of pay may not be altered by the carrier until the Board has concluded its duties. 45 U. S. C. A., secs. 151-156; Railway Employees' Co-op. Ass'n. v. Atlanta, B. & C. R. Co., D. C. Ga., 22 F. Supp. 510.'" (p. 575)

In invalidating the order of the receiver, the court relied wholly upon the provisions of the Railway Labor Act, holding that the Act was applicable to every interstate carrier "including a carrier that is being operated by a receiver." Subdivision (n) of Section 77 of the Bankruptcy Act was not involved as it has no application to railroad receivers. The court's conclusion was compelled by the definition of the term "carrier" to include "receiver" and "judicial"

body in the possession of the business of a carrier. As the term "carrier" is also defined to include "trustee" and "judicial" body in the possession of the business of a carrier it would follow that judges and trustees engaged in the operation and management of a carrier in bankruptcy are as much bound by the provisions of Section 2, Seventh, and Section 6 as receivers. The decision of the Third Circuit in the instant case is in direct conflict with the decision of the Second Circuit Court in *Burke* v. *Morphy, supra.*

C. Circuit Court Erred in Holding that the Decision in the Instant Case was Governed by the Decisions of this Court in Switchmen's Union v. Board, General Committee v. M.-K.-T. R. Co., General Committee v. Sou. Pac. Co., Supra.

The Circuit Court concluded it had no power to grant relief to the petitioners because the Act provided an exclusive remedy with respect to the enforcement or violation of Section 2, Seventh, and Section 6, and referred to the cases cited above. We think it is obvious that these decisions have no application to the facts of this case. They did not involve the power of the District Court to direct its agents to act in accordance with the law in matters where the court itself is budened with ultimate responsibility. Moreover those decisions related to controversies arising under the Railway Labor Act where the statute was silent on the jurisdiction and duty of the court. In the instant case the duty and power of the court has been made plain by subdivision (n) of Section 77 of the Bankruptcy Act and the provisions of the Railway Labor Act. It is unnecessary to make any extensive inquiry here as to the province of the courts as the Congress has stated in unmistakable language what the court shall do.

Moreover, the courts have readily enforced the mandatory provisions and definite prohibitions of the Railway

Labor Act, such as those involved in Section 2, Seventh, and Section 6, even as against carriers which are not in the possession and control of bankruptcy trustees. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, and *Virginian Ry.* v. *Federation*, 300 U. S. 515; see also *Stark* v. *Wickard*, 321 U. S. 288 at pp. 306, 307.

This court recognized that the provisions of Section 2, Seventh, and Section 6 were mandatory in form in *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, when it stated at page 51—

> "* * * Under the statute, no change in rates of pay, rules, working conditions or established practices can be made for thirty days, unless in that time the parties agree to arbitration or an emergency board is created under § 10."

Then in *Telegraphers* v. *Ry. Agency*, 321 U. S. 342, this court held invalid individual contracts which had been executed by the carrier and employees without regard to the collective bargaining contract—

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective bargaining agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements are not effective." (p. 347)

See also *Railway Employees' Co-op. Ass'n.*, v. *Atlanta, B. & C. R. Co.*, 22 F. Supp. 510, where a district court granted an interlocutory injunction requiring the carrier to maintain and keep in force a collective agreement until a representation dispute had been determined by the National Mediation Board.

Nor do we agree with the Circuit Court that the Railway Labor Act provides an exclusive remedy for the violation or enforcement of Section 2, Seventh, and Section 6 against trustees in bankruptcy. The court gave no indication in

its opinion as to *what* remedy had been provided but obviously it referred to some administrative or non-judicial remedy as it held that the district court which had exclusive jurisdiction over the carrier and its trustees had no jurisdiction to enforce Section 6.

It has been suggested by opposing counsel that the sole remedy provided by the statute for the illegal action of the trustees is the right of the aggrieved employee, if any, to prosecute time claims before the Adjustment Board under the provisions of Section 3(i). We do not believe this section was intended to serve as a remedy for the violation or enforcement of Section 2, Seventh, or Section 6. Furthermore, this court held in *Moore* v. *Illinois Central Co.*, 312 U. S. 630, and *Washington Terminal Co.* v. *Boswell*, 134 F. (2d) 235, affirmed by this court in an equally divided opinion, that such administrative remedies as may be available through the Adjustment Board are not exclusive and do not prevent the bringing of a court action under a contract.

The Circuit Court having held and determined that the proposed change in working conditions was within the sweep of the Act, the petitioners are entitled to compliance with the procedure set forth in Section 6. This procedure was a part of the machinery which was established to avoid interruption to commerce and to provide the prompt and orderly settlement of disputes.

This section first requires the carrier and representatives of employees to give a thirty-day written notice of an intended change in agreements affecting working conditions. It provides that within ten days after the receipt of said notice parties interested in such change shall fix the time and place for the beginning of conferences, which time shall be within the thirty days provided in the notice. Then it provides that in every case where the notice has been given, or conferences are being held, or the services of the Mediation Board have been requested, or the Board has proffered its services, working conditions shall not be

altered by the carrier until the controversy has been finally acted upon by the Board, unless a period of ten days has elapsed after the termination of the conferences without request or proffer of the services of the Board.

The Mediation Board is given jurisdiction over (a) disputes concerning *changes* in working conditions not adjusted by the parties in conference, and (b) any other dispute not referable to the National Railroad Adjustment Board. See App. 29, 30, Section 5, First and Second.) The Mediation Board took the position that it had no jurisdiction as the carrier had advised it "* * * that it has filed no notice of a desire to change existing agreements, nor does it propose to do so. * * *." The change, which the Circuit Court held and determined was a change in working conditions within the Act, was a change deliberately and calculatingly brought about by the railroad trustees appointed by the District Court. If the deliberate and willful misconduct of the trustees in the case at bar in refusing to give notice of any proposed change in working conditions and their summary and arbitrary action is condoned by this court, petitioners have no way in which to enforce Section 6 and will be deprived of the mediatory functions of the Mediation Board.

CONCLUSION.

The issue presented by this case is one of great importance. The efficiency and safety of railroad transportation depends in considerable measure upon the maintenance of harmonious relations between employer and employee. The provisions of Section 6 of the Railway Labor Act constitute an important part of the machinery and procedure in the amicable settlement of disputes over proposed changes in working conditions. If industrial strife and conflict are to be avoided, it is essential that this section be enforced judicially.

Without undertaking at this time to present an adequate argument on the merits of the question presented, we sub-

mit that the petition for a writ of certiorari be granted in order that the court may review the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

V. C. SHUTTLEWORTH,
CARL S. KUEBLER,
RUFUS G. POOLE,
Attorneys for Petitioners.

APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 577, as amended in 1934, 48 Stat. 1185, 45 U. S. C., Sec. 151, *et seq.*, read as follows:

"DEFINITIONS.

SECTION 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

* * * * * * * * *

"Sec. 2. * * *

"First. It shall be the duty of al carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation

of any carrier growing out of any dispute between the the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * * * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * * * * * * *

"Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any

process to compel the performance by an individual employee of such labor or service, without his consent.

"National Board of Adjustment — Grievances — Interpretation of Agreements

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act:

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate rep-

resentatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shal be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to

the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes, involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * * * * * *

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to ar-

bitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * * * * * * *

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Excerpts from Section 77 of the Bankruptcy Act (Tit. 11 U. S. C. A. 205).

"(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of

reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the 'Commission'): *Provided*, That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this title. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. * * *

* * * * * * * * * * *

"(c) After approving the petition:

"(1) The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment

thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

* * * * * * * * *

"(n) * * * No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended, June 21, 1934, or as they may be hereafter amended. * * * "

NATIONAL MEDIATION BOARD.
Washington

January 21, 1943

Mr. H. W. Fraser, President,
Order of Railway Conductors of America,
Cedar Rapids, Iowa.

Dear Sir:

This will acknowledge your letter of January 2, 1943, relative to dispute between the Order of Railway Conductors and Central Railroad Company of New Jersey involving question described by you as follows:

"Unable to reach agreement on proposal of management to reclassify Bayway Drill Assignments."

We are now in receipt of communication from Mr. F. M. Falck, Assistant Vice President of the above mentioned carrier, in which he questions the jurisdiction of the National Mediation Board over the dispute submitted by you. His position is outlined in the following quotation from his letter:

> *"It is the position of the Carrier that it has filed no notice of a desire to change existing agreements nor does it propose to do so, and that this matter is a claim which under . . .* the Railway Labor Act is referable to the National Railroad Adjustment Board, if and when the Carrier proceeds with and carries out its its intention of taking off road conductors on these five crews operating wholly within switching limits and substituting yard conductors as required by the Trainmen's Agreement. In other words, when that is done the Conductors, if they feel that any rule or agreement with them has been violated, can proceed exactly as the General Chairman stated in the next to the last paragraph of his letter of November 25th to file a claim with the Adjustment Board for pay for every day the road conductors are denied the right to work on these five crews and yardmen are permitted to man them. It becomes then, a question for the Adjustment Board to interpret and apply whatever agreements can be produced to determine whether the Carrier has violated the agreements or not and make the proper award."

From the above it does not appear that the carrier has yet proceeded to carry out its intention and that when it does, your remedy is to make claim under your existing agreement.

Yours very truly,

ROBERT F. COLE,
Secretary.

Please make submission and replies to correspondence in duplicate.